IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2661 OF 1984

M/s. Hasmukhrai Chandrakant ......Plffs.
vs.
The Oriental Fire and General
Insurance Co.Ltd .....Defnds

A L O N G W I T H
SUIT NO. 2374 OF 1984

M/s. Manilal Commodities P.Ltd ......Plffs.
vs.
The Oriental Fire and General
Insurance Co.Ltd .....Defnds

M.S. Singhvi, Sr. Counsel with R.C. Shah i/b. M/s. Desai and Diwanji for the plaintiffs.

M.P.S. Rao with Ms. R. Tawde i/b. M.V. Kini and Co. for the defendants.

CORAM: S.U. KAMDAR, J.
DATE : 4TH AUGUST, 2005.

JUDGMENT :

1. The present suit being Suit No. 2661 of 1984 has been filed against the insurance company for the recovery of sum of Rs.18,70,322.42/- with further interest on the principal amount of Rs.15,85,019/- at the rate of 18% p.a. from the date of the suit till payment and or realisation.

The said claim has been made on the basis of insurance policy obtained by the plaintiff from the defendant company. Some of the material facts of the present case can be briefly enumerated as under :

2. Some time in or about March, 1981 the plaintiff entered into an agreement for purchase of 2674 drums of soap raw material from one Manilal Holdings SDN. BRD of Penang. Pursuant to the said contract the said goods were shipped by the said company via the ship known as ‘Speed Success’. The port of discharge for the said cargo was Bombay. On 28.3.1981 the said ship ‘Speed Success’ arrived at Bombay. However since no berth was available the said goods were unloaded in lighters from time to time between 9.4.1981 to 9.5.1981 and transported to the Bombay Port. The said goods could not be cleared immediately because of certain investigations undertaken by the customs authority. In view of the customs investigation the said goods were removed from Princess Dock to Hay Bunder Area till its final clearance.

3. It is the case of the plaintiff that the plaintiff applied for the insurance of the said goods because they were immediately not available for clearance and the plaintiffs were interested in covering the risk of loss by fire, theft and burglary by taking out necessary policies. It is the case of the plaintiff that accordingly on 25.9.1981 the plaintiff addressed a letter to the defendants and requested the defendants to provide insurance cover to the said 2674 soap raw material weighing approximately 507.748 metric tones and which were laying at Hay Bunder area. According to the plaintiff the value of the said goods was around Rs.41,70,000/-. Thus the plaintiff took insurance policy of the said goods for sum of Rs.41,70,000/-for a period of two months commencing from 25.9.1981. The plaintiff also furnished the necessary shipping marks inrespect of the said 2674 drums and paid the premium amount as demanded by the defendant for the said insurance policy. The plaintiff thereafter filed the necessary proposal form. The plaintiff has mentioned in the said

proposal form that they will engage watchmen to guard the goods day and night. The proposal of the plaintiff was accepted by the defendants and the defendants issued a cover note. This cover note dated 27.9.1981 insured the said goods against the perils of theft and burglary on various terms and conditions set out therein. The said insurance policy was valid for a period of two months from 27.9.1981 to 24.11.1981.

4. On 30.9.1981 the defendants issued a regular insurance policy to the plaintiff insuring the said goods as per the aforesaid cover note. According to the plaintiff the said policy also covered the risk of theft and towards the said coverage of the said risk the defendant demanded extra premium of Rs.500/- for each and every claim. It is the case of the plaintiff that the plaintiff has paid the said extra premium to cover the said risk of theft also inrepsect of the said goods. It is an admitted position that the said insurance policy had an additional slip appended which inter-alia provided for a special watchmen warranty.

5. It is the case of the plaintiff that subsequently by an endorsement the period of the said insurance cover was extended and the policy was renewed for a further period of two months from 25.11.1981 to 24.1.1982 and for the extension/renewal of the said policy the plaintiff paid the additional premium amount of Rs.4,117/- to the defendants. Thus according to the plaintiff the insurance policy stood validated upto 25.2.1982 in their favour. The renewal of the said policy was on the same terms and conditions as prescribed in the original policy.

6. It is the case of the plaintiff that the goods which were imported by him were lying in the open at Hay Bunder Port Trust, Bombay and in order to protect the said goods against any chance of theft and burglary the plaintiffs through their clearing agents engaged two watchman for two shifts i.e. from 8.30 a.m. to 4.30 p.m. and from 4.30 p.m. to 11.30 p.m.every day to watch the goods. It is the case of the plaintiff that though the said

goods were lying in the enclosed premises of the Bombay Port Trust the Bombay Port Trust did not allow the watchmen of the private parties to guard their goods between 11.30 p.m. to 8.30 a.m. It is further the case of the plaintiff that during the night time the Bombay Port Trust itself was providing for security and there has been a mobile police patrol who takes round of the dock area. It is further the case of the plaintiff that after the customs formalities were over and the customs authority permitted the clearance of the said goods some time in or about 21.1.1982 the plaintiff found on taking inspection that out of 2674 drums 1050 drums were missing and were not available for delivery. In view of the aforesaid the plaintiff could take delivery of the balance drum of only 1080 drums. By letter dated 21.2.1982 the plaintiff informed the defendant that there has been a theft and short delivery of 1051 drums and thus they are lodging the claim under the said insurance policy and filing their detailed claim after making necessary inquiries in the matter. Accordingly the plaintiff lodged the claim for a

less delivery of 1051 missing drums valuing at Rs.16,50,000/-. On 23.2.1982 the plaintiff also informed the police Inspector, Sewree Police station about the loss of 1051 drums out of total 2674 drums and requested the police to record their complaint and investigate the matter at the premises. It is further the case of the plaintiff that the defendant thereafter asked the plaintiff to fill up the claim form and forward the same to the defendants. On 5.4.1982 the port trust authority addressed a letter to the plaintiff and confirmed that inrespect of the items no. 9 and 10 of IGM no. 2668 Ex.ss 'Speed Success' about the manifested quantity of 1830 drums the plaintiff could take delivery of 1623 drums. Thus there was a shortage of 190 drums. It is the case that the port trust authority also confirmed that no more drums were available for delivery. Similarly inrespect of IGM Manifest Item no. 4 and 5 the authority informed the defendant that the entire quantity of 861 drums covered thereunder were lost and not a single drums are available for delivery at Hay Bunder. It was also informed that the said

Shed Superintendent has lodged a report of theft and the said drums have been pilfredged. Ultimately the plaintiffs filed their claim for the entire lost drums on 25.6.1982 pointing out that the said drums have been lost on the various dates unknown to them and that the same had been discovered by them at the time of taking delivery on 24/25.1.1982. By the said claim the plaintiff has claimed the loss suffered for 1051 drums of soap raw material aggregating to 193.295 metric tones at the rate of 8200 per tonne and aggregating amount claimed is Rs.15,85,019/-. The defendants thereafter asked for various particulars and it is the case of the plaintiff that they have furnished the same by their letter dated 6.8.1982. It is further the case of the plaintiff that on 15.12.1982 the defendant informed the plaintiffs that they have entrusted the work to the surveyors V.K. Neelkanth and Co. for making a survey and prepare a report for the goods lost and to carry out comprehensive investigation. It is the case of the plaintiff that surveyor thereafter carried out investigation. Further it was fairly mentioned by

the surveyor that because there was no watchman at night time i.e. from 11.30 p.m. to 8.30 a.m. the said goods have been lost and that the theft has been committed in the night time. It is the case of the plaintiff that the surveyor further gave a report that there has been a breach of the warranty which is appended to the said policy being watchman warranty and therefore the defendant should not make payment of the said claim. The defendant accordingly rejected the claim of the plaintiff. Thereafter the plaintiff by the letter dated 16.4.1993 pointed out that it was not possible to employ the watchman at the night time because of the policies of the Bombay Port Trust and thus the plaintiff cannot be held responsible for any such theft and the defendant company must make payment of the aforesaid amount. By letter dated 17.4.1993 the defendants once again rejected the claim of the plaintiff and refused to entertain the same and thus the plaintiffs after considerable correspondence has filed the present suit for the recovery of the said amount of Rs.15,81,019/-.

7. The defendants have filed written statement and has resisted the claim of the plaintiff. The defendants have submitted in the present written statement that on true and correct interpretation of the policy the policy did not cover the risk of the theft and it is only house breaking and burglary policy. Secondly it has been contended that the said policy was based on special warranty of watchman and the defendants have committed a breach of the said watchman warranty and therefore the plaintiffs are discharged from making payment of any liability thereof. Inrepsect of the other averments the defendants have put the plaintiffs to the strict proof thereof and has not admitted that either the Port trust does not permit the watchman for the night or that the said premises has been duly safeguarded by the mobile patrol police van in the night time. They have further reiterated the report of the surveyors M/s. V.K. Neelkanth who has opined that in all probabilities the loss of the cargo has taken place during the night time when the watchman was not available in breach of the watchman warranty and thus the defendants has

reiterated that the claim of the plaintiff cannot be entertained. In the aforesaid circumstances the defendants have contended that the present suit is liable to be dismissed.

8. The plaintiff has also filed a connected suit being Suit No. 2374 of 1984. In the said suit the plaintiff has claimed an amount of Rs.2,05,867.82/- with further interest on the principal amount of Rs.1,74,464.30/- at the rate of 18% p.a.. The said suit is inrepsect of other consignment of 2631 drums containing 499.890 M.T. of 1000 kgs. each of soap raw material. The said goods also arrived by the same vessel and were unloaded during the same period. Inrespect of the said cargo the plaintiff has also taken out separate policies. It is an admitted position before me and even established on evidence that the terms and conditions of both the policies which is the subject Matter of the suit in the first matter and subject matter in the second matter are identical. In this suit there has been a loss of cargo of about 112 drums and thus the plaintiff has lodged

the claim for the aforesaid amount of Rs. 1,74,464.30/- with the defendant and the defendant having rejected the said claim as well inrespect of this consignment the plaintiffs have filed the second suit No. 2374 of 1984 has been filed in this court. The defendants have raised the identical defence in the second suit.

9. In view of the aforesaid position both the parties before me have agreed that the decision in the first suit being Suit No. 2661 of 1984 must also govern the decision in the second suit being Suit No. 2374 of 1984. Both the parties have led common evidence and common compilation of documents has been filed in this court. On the aforesaid pleadings the issues were framed. Issues in Suit No. 2661 of 1984 are as under :

1 Whether the plaintiff proves that it is entitled to receover from the defendants a sum of Rs.18,70,322.42/- with further interest on Rs.15,85,019/- at the rate of 18% p.a. from the date of the suit till payment and or realization, being the amount of insurance payable to the plaintiff ?

2. Whether the plaintiff proves that the insurance contract was complete and that the said contract did not contain the said watchman warranty ?

3. If the aforesaid Issue No.2 is answered in negative, then whether the defendants prove that the said watchman warranty required the plaintiff to appoint private security guards ?

4. If the issue no.2 is answered in the negative, then whether the defendants prove that private watchman were allowed to be kept by the B.P.T. authorities duriong the third shift i.e. from 11.30 p.m. to 8.30 a.m. ?

5. If the above Issue No.2 is answered in negative, then whether the defendants prove that theplaintiff had fundamentally breached the said watchman warranty clause of teh Insurance Policy by not keeping its own private watchman during the third shift i.e. from 11.30 p.m. till 8.30 a.m., thereby entitling the defendants not to pay the plaintiffs in part or at all ?

6. Whether the plaintiff proves that the said watchman warranty clause is inconsistent with the object of the contract and is void ?

7. If the Issue No.2 is answered in negatives, whether the plaintiff proves that the said clause would not be applicable for the reasons as set out in para 8 of the plaint ?

8. Whether the Defendants prove that the plaintiff’s claim is barred by the law of limitation ?

9. What order ?

10. Issues in the other suit except to the extent of quantity and the claim amount are also identical as in the first suit. On the aforesaid issue common evidence is led before me and the plaintiff has examined three witnesess. The first witness being P.W.No.1 was one Mr. Hasmukhrai being the partner of the plaintiff firm. The said witness has given his examination-in-chief by affidavit dated 20.10.2004 and thereafter filed additional affidavit of evidence dated 22.6.2005. The plaintiff has also led the evidence of Kirit Laxmichand Lapasia who was a clearing agent for the plaintiff at the relevant time for the release of the said goods. The plaintiff has thereafter led the evidence of S.S. Shiralkar who at presently is the Dock Manager at Mumbai Port Trust.

11. The plaintiff has also filed various documentary evidence in the form of compilation Ex.P.1 to Ex.P.22 on record. The defendants have also led the evidence of one witness namely Bindore Dinkar who is the Senior Dock Manager of the defendant company. The defendants have also filed

the compilation of documents and have filed exhibits from D-1 to D-8. In so far as the documents are concerned there is no dispute between the parties. Though the plaintiff is unable to produce the original insurance policy inrespect of the first suit being Suit No. 2661 of 1984 but the plaintiff has relied upon a cover note being cover note dated 27.9.81 as well as the receipt of the payment towards the insurance premium. The plaintiff has relied upon the insurance policy which is admittedly similar to the one issued in the first matter and now not traceable. The plaintiff has further produced the insurance policy dated 22.1.1982 which is an insurance policy inrespect of the second suit consignment. Both the parties have agreed before me that both the policies were infact issued and were of identical terms. Though initially the defendants had sought to contest that the defendants having failed to produce the original insurance policy in the first suit the same should be dismissed. However subsequently inview of the evidence of the witness of the defendant in which he has admitted that the

policy was issued in the first suit also to the plaintiff inrespect of the first consignment and the terms and conditions of the said policy were identical to the house breaking and burglary policy which is also a policy in the second consignment the said plea has been given up.

12. The evidence led before me essentially pertains to the procedure under which the said cargo is delivered at the port, the method and manner in which the cargo is stored and at what point of time the cargo was cleared and the loss of the defendants ascertained by the plaintiffs. The documentary evidence produced before me are in the form of correspondence also in the form of insurance policy and other evidence to show that the insurance policy was obtained by the plaintiff from the defendants herein.

13. Essentially the suit is contested by the defendants on two basic grounds namely that infact the policy which has been issued on its true and proper interpretation is not a policy covering the

risk of theft and it is merely a policy for house breaking and burglary. It has been contended that once the insurance policy did not cover the risk of theft and admittedly the goods are lost by virtue of theft from the dock area the defendants are not liable to make payment of the said insurance amount as claimed by the plaintiff. Alternatively it has been contended that assuming that, if such a risk is also covered by the insurance policy then in that event admittedly the policy had a super imposed condition specially attached to both the policy being a warranty of watchman from the plaintiff to safeguard and protect the said goods. It has been contended that the said watchman warranty applied round the clock for 24 hours and infact the plaintiffs themselves in the proposal form gave an assurance that they will provide for watchman in the night as well as day time. Since there is a breach of the said warranty as admittedly the defendants have not provided for the watchman in the night the defendants liability under the insurance policy cease to exist and the defendant cannot be made liable to make payment of

the insurance claim under the said policy.

14. On the other hand the learned counsel for the plaintiffs has repudiated the aforesaid conditions by contending that infact the policy included the coverage of risk of theft and though the printed terms and conditions of the said policy only provides for house breaking and burglary but by virtue of the additional terms imposed in the said policy the defendants have also covered the risk of theft in so far as the suit policies are concerned. It has been also contended that infact by charging extra premium of Rs.500/- the defendants have covered the risk of theft inrpesect of the said goods and therefore it is not open for the defendant to now contend that the policy does not cover the risk of theft. In so far as the warranty for watchman is concerned. Learned counsel for the plaintiffs has contended that the said warranty of watchman does not apply to the risk covered by theft as it only applies to the risk of burglary. Secondly it has been contended that assuming such a condition is applicable to the said policy even

inrespect of the risk covered by theft then in that event the plaintiffs has complied with the said conditions because the plaintiff has provided for watchman from 8.30 a.m. to 4.30p.m. and 4.30p.m. to 11.30p.m. i.e. day and night as mentioned by them in their proposal. Non providing of the watchman during 11.30 p.m. to 8.30 a.m. according to the learned counsel for the plaintiffs is irrelevant because once the watchman is provided during 11.30p.m. in the night time it means providing of watchman both day and night and no watchman is required from 11.30 p.m. to 8.30 a.m. Alternatively the learned counsel for the plaintiffs have submitted that in any event there is a substantial compliance of the warranty of watchman because during the major part of the day the watchman is provided and during 11.30p.m. to 8.30 a.m. the plaintiff cannot provide for a watchman because the port trust authorities were not permitting such providing for a watchman during that time. It has been contended that by leading evidence of the Deputy Dock Manager of the Docks the plaintiffs have established that the port trust

authority was not permitting the watchman to be employed during the period from 11.30 p.m. to 8.30 a.m. and thus for non-providing of the watchman at that time the plaintiff cannot be faulted with. In any event there was a watchman of the port trust and the goods were patrolled by the police during that period also and thus there is a substantial compliance of the said watchman warranty and therefore the defendants are liable to make payment of the insurance amount covered by the said policy in favour of the plaintiff herein.

15. The third contention which has been advanced by the learned counsel for the defendants that it is not possible to ascertain when the goods were lost in the port and it could be that the goods were already lost prior to the taking out the policy on 13.9.1981 because admittedly the goods are landed sometime in April/May 1981. However the learned counsel for the plaintiff has rightly pointed out that there is no substance in the aforesaid contention because there is no pleadings of any such nature nor it has been contended that

there was misrepresentation by the plaintiff while obtaining the policy because the goods were already lost before applying for the policy. If it was so the defendant was required to raise such contention in the written statement and seek avoidance of the policy on such ground. The fact that the policy was obtained fraudulently and/or on the basis of false representations is required to be specifically pleaded and proved. There is no such plea and no such evidence and there is no such issue before me. In view thereof it is not possible to at all entertain such a contention on behalf of the defendants.

16. Now turning to the other contentions which are raised before me, I am of the opinion that the contention, that the policy is only for house-breaking and burglary and does not cover risk of theft requires to be rejected outright. It is because the policy which has been produced before me inrespect of the second suit and admittedly the terms and conditions thereof are identical to the first policy in schedule provides by type written

words as under :

> "Warranted that this policy is also extended to cover theft, risk subject to cost of Rs.500/- for each and every claim".

17. These words are separately added to this policy in a schedule annexed thereto. Once the said words are added and the amount of Rs.500/- recovered towards the said risk by the defendant obviously the theft risk over and above the risk of house breaking and burglary as contemplated in the said policy has been covered by the defendant. However the contention of the learned counsel for the defendant is that the aforesaid words should be ignored and ought not to be taken into consideration inview of the policy as it reads was only in respect of the risk covered by house breaking and burglary and therefore this part of the sentence in the schedule is insignificant and

ought not to be taken into consideration. The aforesaid submission is plainly required to be rejected. Firstly the entire insurance policy of burglary and house breaking is in the printed form and all the terms and conditions are provided in prints whereas the risk of theft has been expressly covered by super imposition of a typed condition in a schedule annexed thereto. It is by now well settled proposition of law that in a printed contract if the parties impose an additional clause by type written or hand written then such special clause becomes a part and parcel of the contract and infact overrides the general terms and conditions of the said contract. In view of the aforesaid position in law which is now well settled it is not possible to accept the contention of the learned counsel for the defendants that the policy did not cover the risk of theft. Secondly in the present case the risk of theft is expressly covered by putting special condition in the schedule and not only that but inrespect of the said coverage of the risk the defendant has demanded extra premium and admittedly the plaintiff has paid the said

extra premium. Once the defendants having received the consideration for covering the risk of theft it is not permissible nor possible to permit them to regal out of their obligation under the said policy inrespect of the risk arising out of theft. In my opinion the reading of the policy as a whole covers all risk i.e. house-breaking, burglary and theft. In view of the aforesaid I am of the opinion that the contention of the learned counsel for the defendants that on true and proper interpretation and consideration of the terms and conditions of the said insurance policy it only covers the risk of house-breaking and burglary cannot be accepted and is liable to be rejected.

18. Now turning to the second contention which has been advanced before me pertaining to the watchman warranty. The watchman warrantee is appended as a special warranty by a printed leaf. The special watchman warrantee reads as under :

ATTACHING TO AND FORMING PART OF POLICY NO.:

MEMORANDUM :-

It is expressely understood and agreed that a claim under this policy for loss/es or damage/s to the property covered hereby shall be deemed to be valid only if such loss/es or damage/s arise after overpowering the watchman/watchmen.

Subject otherwise to the terms, conditions, exceptions and limitations of the policy

SD/-
DIVISIONAL MANAGER,

19. This appendage has to be co-related to a condition schedule where the following type written words have been inserted.

"Subject to Watchman Warranty attached hereto"

20. Thus by virtue of an addition of these words in the schedule the defendants have provided for a special condition of warrantee to provide watchman

inrespect of the said goods. It is also relevant to note that the proposal which has been given by the plaintiff which is Ex.D.2 on record under Item -4 D reads as under :

> 4(d) Will the premises be guarded by a watchman during day time and at night ?
>
> . Yes, we have also employed 2 men for day time and 2 men for night time.

21. Thus on reading the proposal and policy together leaves no manner of doubt that the watchman warrantee is a special condition attached to the said insurance policy and thus the breach thereof would absolve the defendants from any liability to make any payment under the said policy. The contention of the learned counsel for the plaintiffs that infact the watchman warranty does not apply to the risk covered by theft but

only applies to the risk covered by burglary is simply required to be rejected. It is the addition of the word in a schedule of the policy by which the theft risk is covered at the same time the defendants have also added the words by type written in the schedule that the said risk is covered subject to the watchman warranty attached thereto. Thus it is clear that the intention of the defendants while covering the risk was that the plaintiff will as per their own proposal provide for necessary watchman to secure the said goods and thus the watchman warranty becomes an integral part even inrespect of the risk covered by theft and not only inrespect of the burglary risk. The learned counsel has contended before me that the word theft as defined under the provisions of section 378 of the I.P.C. does not admit of any use of force whereas the warranty attached to the insurance policy inter-alia requires an over powering of the watchman before the goods are stolen. It is his contention that by the user of the aforesaid words in the watchman warrantee the same by necessary implications only applies to burglary and does not

apply to risk of theft covered by the policy. I am unable to subscribe to the aforesaid contention. It is possible that the meaning of theft as defined under the Indian Penal Code may not have use of force but the said definition cannot be imported while interpreting the insurance policy in the present case. A theft also can be avoided if there is a watchman provided for safeguarding of the said goods. Thus merely because the watchman warranty prescribes for over powering of the watchman it cannot be restricted to the risk covered by burglary. As I have mentioned above the words 'subject to watchman warrantee appended thereto' has been super imposed while covering the risk of theft by the defendant and thus in my opinion the said condition also applies to the risk covered by theft. Now turning to the contention that there has been a substantial compliance of the said warrantee and therefore the defendant should be held liable for making payment of the insurance claim. In support of the aforesaid contention the plaintiffs have produced a witness who is the Dock Manager being P.W. No.3. He has deposed that the

Bombay Port Trust normally does not allow the watchman at the night time because the yards are closed and the watchman of the B.P.T. are available. However in the course of the cross examination he admitted that at the relevant time he was not concerned with the security requirement of the Bombay Port Trust and he was in the labour department. He has further deposed that he made such statements on the basis of inquiries made by him from the security officer at the relevant time. The evidence is purely hear-say. As against that the defendants has produced a letter dated 31.3.1982 addressed to the surveyor by one Mr. Deshmukh and he has stated in the said letter that the private watchman were required to be appointed to guard the consignment 24 hours and in the present case the goods have been lost because the plaintiff did not provide the watchman in the night duty. He has also stated that in the said letter that the Shed Superintendent requested the plaintiff to keep the watchman during the night time rather than keeping the watchman in the day shift but the party never paid any attention and

continued to withdrew the watchman by 9.p.m. leaving the consignment to the mercy of vagrants. This document has emancipated from a person who was in charge of the security at the relevant time. It is contempareous document and thus most credible and reliable piece of evidence.

22. On the other hand from the evidence before me it is not possible to hold that there is a substantial compliance of the watchman warranty and therefore the defendants should be held liable to make payment of the aforesaid amount. In any event the theory of substantial compliance in the present case is misnomer. Even if the watchman is kept at a major part of the day but not kept on some part of the day or night then there is likelihood of theft being taken place at that point of time. Thus to apply the theory of substantial compliance in the present case would in my opinion would result in absurd consequence. I do not find any substance in the aforesaid arguments and accordingly I reject the same. The learned counsel has further contended that under Clause-1 of the

terms and conditions of the policy what was required is substantial compliance only. The said clause reads as under :

> **Provided always** that the due observance and fulfilment of the conditions contained herein or endorsed hereon shall so far as the nature of them respectively will permit be deemed to be conditions precedent to any right of the Insured to recover hereunder"

23. It is his case that by virtue of the second proviso to the said policy which provides that there should be due observance and fulfilment of the conditions attached to the special policy in so far as it is possible. It has been thus contended that the conditions are required to be complied with in so far as they are possible to be complied with. It has been contended that since the port trust authorities were not permitting the employment of the watchman in the night time the plaintiff cannot be held responsible because that condition or a warrantee was not possible to be complied with in view of the policy of the port trust. Thus it is contended that by not employing the watchman in the night time due to the

restrictions of the BPT the plaintiff cannot be made to suffer. Insupport of the aforesaid contention the learned counsel for the plaintiff has relied upon the evidence of the plaintiff himself who has deposed that the BPT were not permitting the watchman at the night time. He has also relied upon the evidence of the clearing agents of the said deputy Dock Manager. I have considered the said evidence of the said witness. I am of the opinion that the said evidence cannot be accepted firstly because, the plaintiff has not made any application to the port trust authority calling upon them to permit the private watchman at the night time also. The letter of the port trust which are relied upon at Ex.P.19 and Ex.P.20 were only addressed after filing of the suit in 2004. On record there is no evidence to show that at the relevant time the plaintiffs made efforts to get the said watchman posted during the night time and or the port trust authority refused the said request. Mere oral evidence at this stage cannot be accepted in its totality. The evidence of the Port Trust officer is totally without any

substance. Infact as pointed out above he was not concerned with the security at the relevant time. Further more the concerned security officer who was on duty and has addressed a letter dated 31.3.1982 has describes the situation other way round. It was a known factor at that time that this soap raw material was the subject matter of thefts. Various consignments belonging to various consignees were imported and there were many complaints of theft of the goods in the port trust area. It was thus necessary to provide for sufficient protection. Apart therefrom the policy has been obtained by the plaintiffs from the defendants on an express premises as mentioned in the proposal being Clause-4D which is set out herein above.

24. The said clause-4D expressly indicate that an undertaking was given on the part of the plaintiff that they will provide for a watchman also in the night. The contention of the learned counsel for the defendants that they provided for watchman upto 11.30p.m. that to be construed for the word ‘night’ and therefore the said

condition/undertaking is complied with is merely required to be rejected.

25. The learned counsel for the plaintiff in my opinion has rightly relied upon the judgment of the apex court in the case of **Oriental Insurance Co. Ltd vs. Samayanallur Primary Agricultural Coop Bank reported in 1999 8 S.C. 543** in which the court has held as under :

> "There was no necessity of referring to the dictionaries for understanding the meaning of the word ‘safe’ which the parties in the instant case as proved to have understood while submitting the proposal and accepting the insurance policy. The cashier’s box could not be equated with the safe within the meaning of the insurance policy. The alleged burglary and the removal of the cash box containing the jewellery and cash was not covered by the insurance policy between the parties. the insurance policy has to be construed having reference only to the stipulations contained in it and no artificial far-fetched meaning could be given to the words appearing in it."

26. In my opinion in view of the aforesaid proposition of law laid down by the apex court it is not possible to accept the contention of the learned counsel for the defendant that providing of a watchman upto to 11.30 p.m. must be read as if the watchman is provided for the whole night. In my opinion the reading of the terms of the proposal and the conditions of the insurance policy it leaves no manner of doubt that the watchman warranty was a special warranty imposed on the said policy even for the risk of theft and therefore the same forms a special condition thereto. It was necessary that the said condition was required to be adhered to and only by due observance of the said condition would entitle the plaintiff to recover the amount in the insurance policy for the risk covered by theft. In view of the fact that the plaintiff failed to abide by the said special condition attached to the said insurance policy, it is not possible for me to hold that the defendant is liable to make payment of the insurance amount covered in the said policy towards the loss of the goods. By virtue of the breach of the warranty by

the plaintiff the liability of the defendant under the said insurance policy stands discharge and thus in my opinion the defendant is not liable to make any payment to the plaintiff herein. In the aforesaid circumstances I pass the following decree.

Both the suits are hereby dismissed. There shall be no order as to costs.

SD/-

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